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UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 21

COASTAL MARINE SERVICES, INC.,

Respondent,

and

INTERNATIONAL ASSOCIATION OF  
HEAT & FROST INSULATORS AND  
ALLIED WORKERS, LOCAL 5,

Charging Party.

Case 21-CA-139031

**CHARGING PARTY'S  
SUPPLEMENTAL BRIEF**

## **I. INTRODUCTION**

This supplemental brief is submitted to address the relevance of the Supreme Court’s decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), to the issues in these cases. *See also Ernst & Young LLP v. Morris*, No. 16-300, and *NLRB v. Murphy Oil USA, Inc.*, No. 16-307. The Supreme Court issued a narrow ruling in these three cases based upon the particular procedural and factual posture of those cases. They do not, by any means, resolve the issues raised in this case with a very narrow and speculative exception. We explain in this supplemental brief those issues that now must be faced by the Board in this case.

## **II. THE IMPACT OF EPIC SYSTEMS IS NARROW**

In each of the three cases in the Supreme Court, there were pending statutory collective actions under the Fair Labor Standards Act and, in particular, collective actions as permitted by the provision in 29 U.S.C. § 216(b). The Supreme Court, relying on the arbitration policy contained in the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 2, 3 and 4, held that the FAA prevailed over the terms of the National Labor Relations Act (“NLRA”), that the statutory collective action in that case created by the statute would be waived under the Federal Arbitration Act and that the National Labor Relations Act did not override that provision. Although that was not a “class action,” the Court was clear that the same principle would apply to a class action brought under Federal Rule of Civil Procedure 23. That is the limited holding of the Court. It addressed nothing else. The Court, for example, did not address the right of two or more employees to bring the same claims to the Department of Labor to investigate or to file a joint lawsuit that did not seek statutory collective action status or class action status.

The Board has recently dismissed cases relying on *Epic Systems*. *See, e.g., Northrop Grumman Sys. Corp.*, 366 NLRB No. 147 (Aug. 2, 2018); *Kellogg, Brown & Root, LLC*, 366 NLRB No. 153 (Aug. 2, 2018); and *Exeter Fin. Corp.*, 366 NLRB No. 151 (Aug. 2, 2018). What is, however, significant about each of these cases is that the Board expressly relies upon the limited nature of *Epic Systems*, which only addresses “whether employer-employee agreements that contain class- and collective-action waivers” violate the National Labor

Relations Act. *Northrup Grumman*, slip op. at 1; *Kellogg, Brown & Root*, slip op. at 1; *Exeter Fin.*, slip op. at 1. Thus, the Board has affirmed that *Epic Systems* is extremely limited in its application to only those circumstances.

Nothing in *Epic Systems* attacks or undermines the basic proposition established by the Board in *Murphy Oil, USA, Inc.*, 361 NLRB 774 (2014), *enforcement denied*, 808 F.3d 1013 (5th Cir. 2015), *affirmed* \_\_\_ U.S. \_\_\_ (2018), and *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in part*, 737 F.3d 344 (5th Cir. 2013), that bringing claims to government agencies and courts has been and will continue to be protected concerted activity. That fundamental proposition was not disturbed. The only exception created in *Epic Systems* was that the National Labor Relations Act does not extend to requiring employers to allow matters to be brought as statutory collective actions or as class actions under the Federal Rules of Civil Procedure.

And even more narrow is that this exception only governs where the Federal Arbitration Act applies to the arbitration procedure that waives the right to bring such claims. If the FAA does not apply any restriction on group, class, collective or representative actions would be unconscionable under California Law. *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005).

Nothing in *Epic Systems* undermines the multiple cases in which the Board has upheld the right of employees to concertedly pursue claims and disputes outside of the workplace and, in particular, to investigatory bodies, adjudicatory bodies, and legislative entities. The Supreme Court interpreted the phrase “mutual aid and protection” from Section 7 as extending and including protection for concerted activities “outside the immediately employee-employer relationship.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). As long as the activity is concerted, the employees’ action is protected. See *Meyers Indus.*, 281 NLRB 882 (1986). Thus, even initiating group action or action that is the logical outgrowth of group action is protected. *Salisbury Hotel*, 283 NLRB 685, 686-87 (1987). The Developing Labor Law has string cites of such cases. See *Developing Labor Law*, pp. 6-175-177 (John E. Higgins, 7th Ed. 2018). See very recently *Murray Am. Energy, Inc.*, 366 NLRB No. 80, slip op. at 11-13 (2018). See Robert

A. Gorman & Matthew W. Finkin, *Labor Law Analysis and Advocacy*, Ch. 16 § 2-3 (2013), for a more thorough explanation.

In summary, an arbitration agreement may purport to waive consolidation, group action, individual action as an outgrowth of group action, consolidation action, two employees together, or any form of concerted action, but such action cannot be waived by an arbitration agreement until and unless it reaches a statutory collective action or a class action under Federal Rule of Civil Procedure 23 and the arbitration agreement that waives that right is governed by the Federal Arbitration Act.

*Epic Systems* particularly noted that the statutory collective actions and the Federal Rules of Civil Procedure were statutory creations after the National Labor Relations Act was enacted. In California, where this case arises, the reverse is true. The statutory class action was initially and originally enacted in 1872 as part of the so-called Field Code. *See* Cal. Code of Civ. Proc. § 382. The right of individuals to join others in actions has also been part of the law since 1872. *See* Cal. Code of Civ. Proc. § 378. Furthermore, for example, the California Labor Commissioner has entertained claims and investigated such claims since the Nineteenth Century in California. The Legislature created the first Labor Commissioner position when the first Bureau of Labor Statistics was approved in 1883. 1883 Cal. Stat. pp. 27-30. *See generally* Lucile Eaves & J. David Sackman, *A History of California Labor Legislation* (2012). Thus, *Epic Systems*' reliance on the newly created rights under federal law is not applicable in California, for these collective rights have existed since the Nineteenth Century.

In summary, then, nothing in *Epic Systems* can be read to limit all the prior Board cases that protect the right of workers bringing their claims outside the direct employment relationship to state and federal agencies, whether administrative, legislative, judicial, the executive branch, and even to the public's attention.

### **III. BOEING REQUIRES EVIDENTIARY RECORD TO ESTABLISH A LEGITIMATE BUSINESS JUSTIFICATION FOR ANY RULE THAT RESTRICTS SECTION 7 ACTIVITY**

The Charging Party takes the position that the employer had an obligation to present

evidence supporting its claim that its arbitration agreement serves a business purpose. This includes the prohibition against group or collective claims. That issue is still pending before the Board in this case.

The Board held recently in *Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017), *reaffirmed*, 366 NLRB No. 128 (July 17, 2018), that an employer could establish a business justification for a rule that restricted Section 7 activity. Here, the employer refused to provide any such evidence and this case should be remanded to the Administrative Law Judge to require the employer to provide such evidence. The Charging Party may also present evidence to rebut the claim of substantial business justification.

The fact is that this arbitration agreement imposes substantial burdens and hurdles on employees who want to pursue Section 7 claims through the very arbitration procedure. For example, it incorporates “[a]ll rules of pleading (including the right of demurrer), all rules of evidence ....” This is, in fact, contrary to the fundamental purpose of the Federal Arbitration Act, if it even applies. The arbitration agreement violates the fundamental attribute of arbitration, which, as the Supreme Court has repeatedly emphasized, is to provide “lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.” *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 348 (2011) (quoting *Stolt-Nielsen, S.A. v. AnimalFeeds Int’l. Corp.*, 559 U.S. 662, 685 (2010)).

Here, the Charging Party will establish that the procedure which includes, for example, full discovery rights and other burdens and procedures is exactly the opposite of arbitration, as well as other administrative procedures available to employees to bring their claims. *See Sonic-Calabasas A., Inc. v. Moreno*, 57 Cal.4th 1109 (2013).

In addition, Charging Party will prove that the real reason that the arbitration procedure was implemented was to avoid any form of group action including statutory collective and/or class actions. Because there is so much litigation in California because employers violate wage and hour laws, the real purpose is to avoid any group actions and not for any other legitimate business purpose.

The Board cannot decide the issues before this case without remanding the matter to the Administrative Law Judge to hear evidence by the employer and rebuttal by the Charging Party as to the business justification and the argument that there is no business justification.

**IV. THE BOARD MUST EXAMINE EACH ARBITRATION AGREEMENT TO DETERMINE WHETHER THE SAVINGS CLAUSE APPLIES**

Assuming that the Federal Arbitration Act applies, something we contest in this case, the Board is forced to examine the effect of the savings clause. Section 2 of the FAA provides that such arbitration agreements are enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.” California has applied its unconscionability doctrine in many circumstances to arbitration agreements. *See Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83 (2000). The savings clause is a federal doctrine and charging parties must be entitled to argue and the Board must consider whether a particular arbitration agreement or any clause thereof is unconscionable or otherwise invalid under the savings clause. *See Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005).

Here, as we argued in our Exceptions and as we have pointed out below, there are provisions in this particular arbitration agreement that are subject to the savings clause and an unconscionability argument. These will be presented in each case to the Board.

We recognize that the Board will attempt to avoid the application of the savings clause and state unconscionability (or federal unconscionability) doctrines to arbitration provisions. Nonetheless, that’s the result of the application of the Federal Arbitration Act under the Court’s decision in *Epic Systems*, if it applies beyond statutory collective actions and class actions under the Federal Rules of Civil Procedure.

This principle is further heightened by the discussion above regarding the *Boeing* case and the obligation of the employer to prove business justification.

In summary, then, each term of each arbitration agreement will have to be examined to determine whether there are provisions that are subject to the savings clause and unconscionable or voidable under state law or federal law.

**V. THE FEDERAL ARBITRATION ACT DOES NOT APPLY**

There is no pending dispute. Rather, all that has occurred is a challenge to the maintenance of the arbitration provisions. We have argued extensively in our brief in support of Exceptions why the FAA does not apply.

Coastal Marine's position depends upon the FAA, which does not apply. The FAA applies to "a contract *evidencing a transaction* involving commerce." 9 U.S.C. § 2 (emphasis supplied). The party claiming FAA preemption has the burden of proof to show the contract involves interstate commerce. *Woolls v. Superior Court*, 127 Cal.App.4th 197, 211-14 (2005). Coastal Marine has not met that burden. Moreover, Respondent is claiming that the FAA preempts state law, so Coastal Marine has the burden of demonstrating preemption – including the burden to prove that the agreement affects interstate commerce. *See id.* at 211-14; *Lane v. Francis Capital Mgmt. LLC*, 224 Cal.App.4th 676, 687-88 (2014); *Shepard v. Edward Mackay Enters., Inc.*, 148 Cal.App.4th 1092, 1101 (2007).

The Supreme Court has addressed whether employment agreements, without more, are governed by the FAA. *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956), held that an agreement to arbitrate involving an employee employed by a New York corporation who entered into the agreement in New York, but ultimately performed services in Vermont, was not subject to the FAA as there was no showing the employment contract had any bearing on commerce. *Id.* at 200-01. The nature of the Bernhardt's work was not relevant.

If activity is limited to a local market, the presence alone of a national entity does not support FAA preemption. *See Slaughter v. Stewart Enters.*, No. C 07-01157 MHP, 2007 U.S. Dist. LEXIS 56732, at \*20 (N.D. Cal. 2007). "[T]he reaches of the Commerce Clause are not defined by the accidents of ownership." *Id.* There, the FAA did not govern a crematorium worker's employment claims because his duties were purely intra-state. *Id.* at \*22-23. That the defendant owned and operated businesses in other states did "not undermine the conclusion that the activity is confined to local markets." *Id.* at \*20. Similarly, in *H. L. Libby Corp. v. Skelly & Loy*, 910 F.Supp.195, 198 (M.D. Pa. 1995), the FAA did not govern because while "Libby is an

Ohio corporation and Skelly is a Pennsylvania corporation, there is nothing to indicate that this contract involved commerce between two states. Rather, all correspondence arising out of the contract was within Pennsylvania .... [and] the services were performed in Pennsylvania ....” *Id.* (citing *Merritt-Chapman & Scott Corp. v. Pa. Turnpike Comm’n*, 387 F.2d 768, 772 (3d Cir. 1967)).<sup>1</sup>

The burden is on the Respondent, who has raised the affirmative defense of the Federal Arbitration Act, to prove that it applies.

To the extent that the employer had employees sign the “Employee Acknowledgment and Agreement” regarding the arbitration policy, we agree that that is a contract. But it does not affect commerce for reasons argued. As a result it is invalid to prohibit group or class actions. *Discover Bank*, 36 Cal.4th 148.

The Board must face the application of Section 7 to arbitration agreements that are not governed by the Federal Arbitration Act. This case squarely presents that issue and cannot be avoided.

**VI. AS LONG AS THE ARBITRATION AGREEMENT PROHIBITS RESORT TO GROUP, CONSOLIDATED, COLLECTIVE, JOINT, REPRESENTATIVE OR ANY OTHER FORM OF CONCERTED ACTIVITY, IT IS UNLAWFUL**

We separate this argument to emphasize both the limited nature of *Epic Systems* as well as the broad scope of the arbitration provision in this case. The “Employee Acknowledgment and Agreement” is exceedingly broad because it applies to “any claim, dispute, and/or controversy that [the employee] may have against the Company (or its owners, directors, officers, managers, employees, or agents), or the Company may have against [the employee] ....” Because the “Employee Acknowledgment and Agreement” is not a contract, it also includes claims that would not be related to contract or statute: “all disputes that may arise out of or be related in any way to [the employee’s] employment ....” The “Employee Acknowledgment and Agreement” referred to above is broad enough to cover every dispute no matter how minor.

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<sup>1</sup> The recitation in the Agreement that the “Company’s business involves interstate commerce” does not address whether the FAA governs any dispute or any agreement to arbitrate that dispute.



As noted above, the Board has long held that resort to administrative agencies, the legislatures, the executive branch or courts is protected concerted activity. Here, Coastal Marine attempts to preclude any such resort to such administrative agencies, legislative bodies, executive branch or the courts.<sup>2</sup>

We address the limited exception in the Employee Acknowledgment and Agreement:

The only exception to the requirement of binding arbitration shall be for claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, Employment Development Department claims, or as may otherwise be required by state or federal law.

First, the exemption is limited to the type of agencies described and does not include OSHA, the Office of Special Counsel of the Attorney General of the United States, the California Labor Commissioner and other administrative agencies. The policy unlawfully restricts employees from bringing claims to the Equal Employment Opportunity Commission and other federal agencies.

For reasons argued in the brief in support of Exceptions and here, the policy is overbroad, even applying *Epic Systems*.

## **VII. IN A UNIONIZED CONTEXT, AN ARBITRATION AGREEMENT IS UNENFORCEABLE**

There are several reasons why the arbitration procedure is unlawful in a union context. The provision prevents organizing because it enforces an unlawful provision to hinder Section 7 rights to select a union.

First, it is unenforceable. *See J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

Second, unions have standing to bring many claims on behalf of members before various courts, administrative bodies and so on. *See, e.g., Social Servs. Union, Local 535 v. County of*

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<sup>2</sup> The Complaint alleges that the “Employee Acknowledgement and Agreement” “contains provisions requiring employees to resolve employment-relate disputes exclusively through individual arbitration proceedings...” The ALJ found that the provision unlawfully prohibits “joint, class and collective actions in all forum...”

*Santa Clara*, 609 F.2d 944 (9th Cir. 1979), and *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544 (1996).

Third, the prohibition against any group claim would prohibit a union steward or union representative from representing an employee with respect to a disciplinary matter. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). Although there is no union yet in this workplace, the prohibition against such rights is an interference with the right of the employees to organize to obtain those rights.

The Board must now face the question of whether the prohibition in the agreement and the policy violate the Act because they would prohibit a union's intervention in any claim or dispute.

Nothing in *Epic Systems* waives the Union's right to bring class actions as long as it meets the applicable standing requirements. Nor is there any claim that the Union has waived any such right.

#### **VIII. THE ARBITRATION AGREEMENT IS UNCONSCIONABLE UNDER STATE LAW**

As we've pointed out above, the savings clause of the Federal Arbitration Act, assuming it applies, voids an arbitration agreement that is otherwise unenforceable. Here, we apply the California doctrines of unconscionability, which are applicable even if the Federal Arbitration Act applies.

We suggest a few points of unconscionability.

First *Armendariz*, 36 Cal.4th 148, requires that the employer pay all the costs of arbitration, except those that might be incurred in a court proceeding. It is unconscionable for that reason alone.

Because Respondent is in California, an employee could proceed to the Labor Commissioner through the Berman process contained in section 98 of the California Labor Code, which would impose no costs whatsoever. Here the advantages of the Berman hearings that are eliminated by the Employee Acknowledgment and Agreement:

1. Assistance is provided to the claimant by the Labor Commissioner's office in filling out the Initial Report or Claim form and processing the claim;<sup>3</sup>
2. There is a simple and available Initial Report or Claim form to fill out;<sup>4</sup>
3. The Labor Commissioner publishes detailed instructions on how to fill out the form and explaining the various statutes involved;
4. The Labor Commissioner investigates the claim and has the discretion not to issue a Notice of Hearing, which limits unnecessary litigation for both parties;
5. The Labor Commissioner must decide within thirty days of the filing of the Initial Report or Claim whether a hearing will be held, no action will be taken, or an action will be initiated under section 98.3 of the California Labor Code;
6. If the Labor Commissioner decides to take the case, the Notice of Hearing must issue within ninety days;
7. After investigation, a Notice of Claim and Conference is issued. That Notice summarizes the claim and sets a conference before a Deputy Labor Commissioner to attempt to resolve the claim;
8. If the matter is not settled with the assistance of the Deputy Labor Commissioner, the Deputy prepares the complaint for the employee to sign;<sup>5</sup>
9. No discovery is permitted in the administrative process, except to the extent information is learned at the Conference both by the claimant and the employer;

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<sup>3</sup> Videos are available to assist wage claimants. Cal. Dep't of Indus. Relations, *How to file a wage claim*, <https://www.dir.ca.gov/dlse/HowToFileWageClaim.htm> (last visited Aug. 10, 2018).

<sup>4</sup> The form is available in English, Spanish, Chinese, Korean, Vietnamese, Tagalog, and Punjabi. For the English-language form, see <https://www.dir.ca.gov/dlse/Forms/Wage/English.pdf>.

<sup>5</sup> *Cuadra v. Millan*, 17 Cal.4th 855, 861 (1998).

10. Subpoenas for production of records at the Berman hearing are available and are issued by a Deputy Labor Commissioner;<sup>6</sup>
11. The Labor Commissioner unilaterally issues the Notice of Hearing setting the date and location and stating the issue(s) and the remedy;
12. The hearings are conducted informally (Cal. Lab. Code § 98(a));<sup>7</sup>
13. No pleadings are allowed except the complaint and an answer (Lab. § 98(d));<sup>8</sup>
14. The Hearing Officer may assist the unrepresented employee or employer in presenting evidence and explaining the procedures and applicable law;<sup>9</sup>
15. The Labor Commissioner must make an interpreter available (Cal. Lab. Code § 105);
16. The hearing is recorded, and, if one party requests the transcript or recording, the other party is to be provided a copy free of charge;<sup>10</sup>
17. Informal rules of evidence are applied;<sup>11</sup>
18. The Order, Decision or Award must issue within fifteen days after the hearing (Cal. Lab. Code § 98.1);
19. The informality of the Berman process is preserved because the Administrative Procedure Act does not apply;

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<sup>6</sup> Cal. Code Regs. tit. 8, § 13506.

<sup>7</sup> Cal. Code Regs. tit. 8, §§ 13502, 13505 and 13506.

<sup>8</sup> The Notice of Hearing includes the Complaint, which sets out the claim.

<sup>9</sup> Cal. Dep't of Indus. Relations, *Policies and Procedures for Wage Claim Processing*, <https://www.dir.ca.gov/dlse/policies.htm> (last visited Aug. 10, 2018).

<sup>10</sup> Cal. Code Regs. tit. 8, § 13502.

<sup>11</sup> This reinforces the evidentiary burdens imposed on employers who do not maintain records required by law. *See Hernandez v. Mendoza*, 199 Cal.App.3d 721(1988); Cal. Code Regs., tit. 8, § 13502.

20. Any appeal must be filed within fifteen days from the service of the ODA;
21. If no appeal is timely filed, a judgment is automatically entered (Cal. Lab. Code § 98.2(e))
22. Legal representation may be provided for free to the wage claimant by the Labor Commissioner's office in the de novo appeal (Cal. Lab. Code § 98.4);
23. The appeal is de novo;
24. The appeal does not require the preparation of any pleadings except the Notice of Appeal which is an available form;
25. No response is required by the wage claimant to the Notice of Appeal;
26. The trial court has the discretion to allow limited discovery, consistent with the de novo nature of the appeal;<sup>12</sup>
27. A bond is required to be secured by the employer in the amount owed in order to ensure prompt payment;<sup>13</sup>
28. An attorney representing the wage claimant on appeal can receive attorney's fees (Lab. § 98.2(c));
29. Interest runs on the ODA from the date wages were due and payable;<sup>14</sup>
30. A claimant can expand the issues beyond those presented at the hearing, subject to the discretion of the trial court;
31. The employer is not limited in its defenses;

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<sup>12</sup> *Sales Dimensions v. Superior Court*, 90 Cal.App.3d 757 (1979).

<sup>13</sup> The failure to post the bond is jurisdictional, and any appeal without a bond must be dismissed. *See Palagin v. Paniagua Constr., Inc.* 222 Cal.App.4th 124, 127(2013); Cal. Lab. Code § 98.2.

<sup>14</sup> A similar interest provision applies to any action for nonpayment of wages in court. Cal. Lab. Code § 218.6.

32. The Labor Commissioner assists the wage claimant to collect “claims for wages, judgments, and other demands” in other states (Cal. Lab. Code § 103);

33. Special procedures exist for the collection of judgments entered by courts from Berman hearings. Cal. Lab. Code § 96.8.<sup>15</sup> The Labor Commissioner must enforce any judgment, and attorneys’ fees are provided for a judgment creditor to enforce a judgment (Lab. § 98.2(k));

34. Employees can make wage assignments to the Labor Commissioner who then can collect the wage claims (Cal. Lab. Code § 96).

These favorable provisions reduce the costs for any claimant. Coastal Marine’s arbitration agreement imposes additional costs, which are otherwise waived or not applicable for employees who proceed to the Berman process.

The Employee Acknowledgment and Agreement provides that “all rules of evidence ... shall apply and be observed. This imposes a substantial burden, for example, on the individual who would otherwise proceed on behalf of a group to make a claim before the Labor Commissioner where no discovery is permitted. This is simply an advantage to the employer. Although we recognize that under *Armendariz*, discovery may be appropriate in some cases, it’s not appropriate and is unconscionable in some cases. Thus, the provision is overbroad. The “Employee Acknowledgment and Agreement” applies to not only Coastal Marine (as the employer), but also “owners, directors, officers, managers, employees or agents.” There is no evidence that all are similarly bound and therefore, there is no mutuality to the policy. There is no mutuality to whether the “Employees,” meaning other employees, are similarly bound and thus no mutuality.

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<sup>15</sup> Those procedures would not be available in arbitration because any successful claimant in arbitration would have to petition to confirm an arbitration award in order to obtain an enforceable judgment. No fees would be available for the enforcement of the award. *Cf.* Lab. § 98.2(j), (k) (providing for attorneys’ fees to enforce judgments).

The Employee Acknowledgement and Agreement does not provide for any discovery which makes it unconscionable under *Armendariz*.

There are many provisions of the Labor Code that are only enforceable by the Labor Commissioner. None of these provisions of state law were adopted for the purpose of disfavoring arbitration. Rather, the Legislature crafted the enforcement mechanism to encourage the efficiencies and simplicity of having these issues resolved by the Labor Commissioner, a subject matter expert and part of an agency charged with enforcement of these statutes. Moreover, in effect, these provisions limit litigation, which is one of the fundamental reasons for arbitration itself. They foreclose class litigation. Consistent development and enforcement of state law through a specialized agency serves the interests of the state.

The Labor Commissioner does not provide a neutral adjudication process. She is charged with enforcing these laws on behalf of workers. The Berman statutes are an important part of that role. *See* Cal. Lab. Code § 50.5 (“One of the functions of the Department of Industrial Relations is to foster, promote, and develop the welfare of the wage earners of California, to improve their working conditions, and to advance their opportunities for profitable employment”).

Sections 210, 218.7, 225.5, 226(f), 226.3-.5, 226.8, 238, 238.2-.4, 240, 245-250, 558, 1197.2, 1198.5(k) and 1741 of the California Labor Code, are examples of provisions that are not enforceable in court or arbitration but are only enforceable by the Labor Commissioner. *See also Hentzel v. Singer Co.*, 138 Cal.App.3d 290, 298-300 (1982).

In summary, then, this matter should be remanded to the Administrative Law Judge to conduct a hearing as to any potential unconscionability provisions or other provisions that would

void the agreement under state or federal law.<sup>16</sup> This would also void the agreement under the Federal Arbitration Act.

## **IX. ADDITIONAL ISSUES**

We have raised many issues in the Exceptions that must be addressed by the Board in light of *Boeing* and *Epic Systems*:

1. The opt-out box is unlawful because it forces employees to disclose protected concerted activity and is a form of unlawful interrogation and surveillance;
2. The effect of the non-appealability clause by forcing this matter to a new arbitrator is unconscionable and unlawful;
3. The forced arbitration procedure doesn't exempt those provisions that have been held not preempted by the Federal Arbitration Act;
4. The forced arbitration procedure prohibits group claims that are not class actions or statutory collective actions;
5. Because the forced arbitration agreement requires all claims to be submitted to its procedure, employees would be prohibited from engaging in concerted activity to resolve disputes;
6. The forced arbitration effectively limits salting and unlawfully applies after employment ends;
7. Because employees can bring actions before the Labor Commissioner and other administrative agencies for free, the failure to provide that the employer will pay all costs renders the forced arbitration procedure unconscionable;
8. The forced arbitration procedure is unlawful because it prohibits an employee of another employer from assisting the employee of respondent;
9. The forced arbitration is not mutual and it is unconscionable;

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<sup>16</sup> The unlawful rules interfere with the arbitration process and make the arbitration process also unconscionable under state law. For example, employees could not give information to an attorney representing another employee under the rule alleged in paragraph 5(e) which would prevent all employees from assisting other employees. See California Labor Code section 232.



10. The forced arbitration procedure violates ERISA because it requires that ERISA claims be submitted through this arbitration procedure;

11. The forced arbitration agreement prohibits employees from joining together to defend claims by the employer against a group of them;

12. The forced arbitration procedure is unlawful under the Norris-LaGuardia Act and California Little Norris-LaGuardia Act, section 1138.1 of the California Labor Code;

13. The forced arbitration procedure is unclear as to what it applies to;

14. The Religious Freedom Restoration Act includes the core religious activity of helping other workers jointly.

Another important issue in this case is that the employer maintained unlawful rules that interfered with the effective ability of employees to meaningfully challenge or raise disputes. Those rules include the use of recording devices to record information about disputes, the Solicitation and Distribution policy, the Theft policy and the Changes in Status policy.<sup>17</sup> For example, employees could not distribute handbills about workplace disputes during non-work time in working areas. The company's email could not be used to solicit employees to help another employee in a dispute. The solicitation language expressly limits employees from soliciting for "any organization." These rules would prohibit employees from effectively using any arbitration procedure.

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<sup>17</sup> See Complaint Paragraph 5. As noted by the ALJ, the employer settled those allegations and agreed to rescind those rules. Nonetheless they were in place at all relevant times. See Footnote 1 to ALJ Decision. The Board cannot escape analyzing forced arbitration procedures in the context of employer rules which render those arbitration proceedings unconscionable and ineffective.

In summary, then, the Board must face the issue in this case of a situation where there are other employer rules that unlawfully interfere with the use of the mandatory or forced arbitration procedure.<sup>18</sup>

## **X. CONCLUSION**

As the majority pointed out in *Boeing*, every rule that the Board faced had different language, thus causing, in the majority's view, perceived confusion and uncertainty. The Board's effort to avoid that only led to the undermining of Section 7 rights in *Boeing*. Nonetheless, *Boeing* points out that the same process must be applied by the Board in evaluating each and every arbitration policy. They are all written differently. They will have different aspects and different failings. Some will be unconscionable and some will not. Others will not apply to all group claims. Some will prohibit all group claims. The enforceability may vary from state to state depending on the availability of state laws and agencies and the extent of state law on unconscionability. Some will depend on federal law.

The Board in other contexts has been forced to evaluate the impact of state law on Section 7 rights. *E.g.*, *Olean Gen. Hosp.*, 363 NLRB No. 62 (Dec. 11, 2015); *Macerich Mgmt. Co.*, 345 NLRB 514 (2005), *petition for review granted in part and denied in part sub nom. United Bhd. of Carpenters v. NLRB*, 540 F.3d 957, 963 (9th Cir. 2008); *Fashion Valley Mall, LLC v. NLRB*, 42 Cal.4th 850 (Cal. 2007); and *Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1153 (9th Cir. 2003) (all applying state law to access rights).

In summary, then, each term of each arbitration agreement will have to be examined to determine whether there are provisions that are subject to the savings clause and unconscionable or voidable under state law.

In this case, the Board must face these issues. It is true that in other cases recently decided the Board has not been faced with those issues because they have not been raised. They

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<sup>18</sup> This issue is squarely presented because the Employee Acknowledgment and Agreement, which contains the arbitration procedure, acknowledges receipt of the handbook that contains the unlawful rules.

are clearly raised here, and if the Board chooses to avoid or ignore them, the Charging Party will seek review and ask a court to order the Board to consider them.

Dated: August 13, 2018

WEINBERG, ROGER & ROSENFELD  
A Professional Corporation

By: /s/ David A. Rosenfeld  
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## PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On August 13, 2018, I served the following documents in the manner described below:

### CHARGING PARTY'S SUPPLEMENTAL BRIEF

- ☒ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from [kkempler@unioncounsel.net](mailto:kkempler@unioncounsel.net) to the email addresses set forth below.

On the following part(ies) in this action:

Executive Secretary  
National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570-0001

*VIA E-FILING*

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 13, 2018, at Alameda, California.

*/s/ Karen Kempler*

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Karen Kempler